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NOS. 82-185, 82-246, 82-259

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NANCY B. BEECHER, et al.,
Petitioners,

v.

BOSTON CHAPTER, NAACP, et al.,
and
PEDRO CASTRO, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE STATE PETITIONERS

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QUESTION PRESENTED

Whether the district court impermissibly superseded a valid Massachusetts civil service seniority statute in cases dealing with hiring practices by entering remedial orders requiring that percentages of minority members of municipal police and fire departments be maintained despite significant layoffs in those departments.

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BRIEF FOR THE STATE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 679 F.2d 965 (1st Cir.

1982) and appears in the appendix to the State's petition for a writ of certiorari at 1.[1/] The opinion of the United States District Court for the District of Massachusetts is reported at 522 F.Supp. 873 (D. Mass. 1981) and appears in the appendix to the State's petition for a writ of certiorari at 64.[2/]

1/ The joint appendix accompanying this brief will be designated by the signal: "(J.A)." The appendix to the state petitioners' petition for a writ of certiorari will be designated "(P.A.)."The First Circuit appendices for the police and firefighter cases will be respectively designated "(1st Cir. P.A.)" and "(1st Cir. F.A.)."

2/ Previous opinions of the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit in these cases are reported at: Castro v. Beecher, 334 F.Supp. 930 (D. Mass. 1971); 459 F.2d 725 (1st Cir. 1972); 365 F.Supp. 655 (D. Mass. 1973); 386 F.Supp. 1281 (D. Mass. 1975); Boston Chapter, NAACP v. Beecher, 371 F.Supp. 507 (D. Mass. 1974); 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975);

(footnote continued)

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on May 11, 1982. (P.A. 91) The State's petition for a writ of certiorari was filed within ninety days of that date.[3/] This Court granted the State's petition in United States Supreme

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(footnote continued)

423 F.Supp. 696 (D. Mass. 1976). The lower courts and the parties have referred to the cases elliptically as the "police" and "fire" cases.

3/ The state parties are the Massachusetts Personnel Administrator and the members of the Massachusetts Civil Service Commission. The other parties to the consolidated appeals in the United States Court of Appeals for the First Circuit were as follows: Boston Firefighters Union, Local 718, defendant-intervenor in the district court proceeding; and Boston Police Patrolmen's Association, Inc., defendant-intervenor in the same proceedings. The City of Boston, a defendant in that proceeding, took no appeal from the district court decision.

Court No. 82-259 and petitions in Nos. 82-185 and 82-246 on November 1, 1982. 103 S.Ct. 293 (1982). The Court has jurisdiction to review the judgment and opinion of the United States Court of Appeals pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED[4/]

Constitution of the United States, Amendments X and XIV

42 U.S.C. §2000e-2(h)

Mass. Gen. Laws Ann. ch. 31, §6

Mass. Gen. Laws Ann. ch. 31, §39

Mass. Gen. Laws Ann. ch. 31, §58

Federal Rule of Civil Procedure 60(b)

4/ See the addendum to this brief for the texts of salient provisions other than Mass. Gen. Laws Ann. ch. 31, §39. See also addendum to State's Petition for a Writ of Certiorari.

Massachusetts General Laws Ann.

ch. 31, §39 (West)

If permanent employees in positions having the same title in the departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the five-year period following the date of such separation.

Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work or lack of money or abolition of positions shall be taken in accordance with the provisions of section forty-one. Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file

with his appointing authority, within seven days of receipt of such notice, a written consent to his being demoted to a position in the next lower title or titles in succession in the official service or to the next lower title or titles in the labor service, as the case may be, if in such next lower titles or titles there is an employee junior to him in length of service. As soon as sufficient work or funds are available, any employee so demoted shall be restored, according to seniority in the unit, to the title in which he was formerly employed.

Nothing in this section shall impair the preference provided for disabled veterans by section twenty-six.

STATEMENT OF THE CASE

Introduction

This petition arises from an order entered by the United States District Court for the District of Massachusetts in these recently consolidated[5/] cases

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5/ The police and fire cases maintained separate identities throughout their histories, see pp. 9-21, infra, until they were consolidated for purposes of hearing and decision on plaintiffs' motions to modify prior remedial orders filed April 6, 1981.

on August 7, 1981, and a judgment of the United States Court of Appeals for the First Circuit affirming that order. The district court's order, granting plaintiffs' motion to modify prior remedial orders pursuant to Fed. R. Civ. P. 60(b), directed City of Boston and Massachusetts officials to take certain actions to maintain the percentage of black and Spanish-surnamed post-probationary police and fire officers in the Boston Police and Fire Departments, despite personnel reductions in those departments. (P.A. 64-70) Specifically, the district court ordered that layoffs of officers due to lack of funds not be made pursuant to a state civil service seniority statute, Mass. Gen. Laws. Ann. ch. 31, §39, but rather by a procedure designed to

maintain the percentages of black and Spanish-surnamed officers in the respective forces. (P.A. 64-70)

On May 11, 1982, the United States Court of Appeals for the First Circuit affirmed the district court's order. (P.A. 91) The court ruled that "[t]he district court had the equitable power to modify the consent decrees, that the Massachusetts statutory "last-hired first-fired" seniority system is not insulated from the court's orders, and that the orders are not unconstitutional." 679 F.2d at 978. (P.A. 63) The court rejected the state defendants' contentions that the district court's order impermissibly superseded a valid Massachusetts civil service seniority statute, erred by modifying its prior remedial

orders in the absence of sufficient evidence of changed circumstances, and erred by modifying its prior remedial orders when none of those prior orders addressed reductions in force.

The state defendants filed a petition for a writ of certiorari on August 9, 1981. On November 1, 1982, the Court granted petitions for a writ of certiorari in Supreme Court Nos. 82-185, 82-246, and 82-259.

Prior Judicial Proceedings

The cases before the Court have extended judicial pedigrees.[6/] Plaintiffs commenced the police case in 1970

6/ The opinions of the lower courts included in the appendix to the State's petition and cited supra at n.2 set forth the course of the police and fire litigation and, accordingly, we only summarize the salient points of the cases here.

on behalf of a class of persons composed of "all black and Spanish-surnamed persons who have sought, or might have sought, or may hereafter seek employment as policemen in positions covered by Massachusetts Civil Service laws." Castro v. Beecher, 334 F.Supp. 930, 934 (D. Mass. 1971) (Wyzanski, J.). Their original claims, which were based exclusively on the Fourteenth Amendment, were summarized by the district court as follows:

> The claim is that among the practices by which defendants have excluded, limited, and discouraged the employment of black and Spanish-surnamed persons are (a) furnishing on a discriminatory basis information about police employment opportunities, (b) establishing educational requirements not bearing upon any legitimate job qualifications, (c) requiring police applicants to submit to a written examination which has not been validated as

> predictive of successful job performance in the position of policeman and (d) requiring police applicants to submit to other miscellaneous job requirements, such as a height test and a swim test.

Id. After trial, the district court held that "the general intelligence type of police examinations given in 1968, 1969, and 1970 by the Civil Service Commission were not rationally or empirically significantly related to the capacity of applicants to be trained for and to perform a policeman's job." Id. at 924.7/

An appeal followed to the First Circuit. That court affirmed the bulk of the district court's findings, see

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7/ The district court also held, and the First Circuit affirmed, that the recruiting had been "adequately and fairly conducted, and that the educational, height, and swim test requirements all had a significant relation to a policeman's job performance." Castro v. Beecher, 459 F.2d 725, 729 (1st Cir. 1972).

footnote 7, but concluded that the unintentional discrimination represented by the civil service examination was racial in nature. The court suggested that the district court's remedy was based on its "characterization of the 1968-1970 examinations as discriminating broadly against all non-mainstream whites." Castro v. Beecher, 459 F.2d 725, 736 (1st Cir. 1972). The court stated further: "Our contrary view of the discrimination leads us to remedial measures differently affecting both those now on eligible lists and the class (of blacks and Spanish-surnamed persons) represented by plaintiff." Id. Those remedial measures included: a "new examination," "priority pool[ing]" for class members, and "certification" by the Director of Civil Ser-

vice, according to the priority pools, in response to requisitions submitted by police departments. Id. at 737. See Mass. Gen. Laws Ann. ch. 31, §6 (West).[8/]

On remand the parties negotiated and the district court approved and entered an implementing consent decree, Castro v. Beecher, 365 F.Supp. 655 (1973). The consent decree in the appendix to Judge Wyzanski's 1973 opinion contained four sub-sections: "Certifications"; "Future Examinations"; "Recruitment"; and "Reporting." These subsections set forth specific obligations of the parties designed to correct violations found in previous examination and certification

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8/ Although review of the First Circuit decision was not sought in this Court, it was subsequently characterized as "wrongly decided" in Washington v. Davis, 426 U.S. 229, 244 n.12 (1976). See pp. 49-55 infra.

procedures, and to establish priority certification groups for black and Hispanic applicants. Id. at 661-662.

In 1975 plaintiffs brought another action in the district court pursuant to the All Writs Act, 28 U.S.C. §1651, seeking injunctive relief to preserve the effect of certification and appointment procedures established by the 1973 Castro consent decree, in light of certain statutory preferences contained in Massachusetts civil service law. The district court ordered the Civil Service Commission "to certify candidates on the basis of priorities established by the Consent Decree and to give effect to Massachusetts statutory preferences . . . only within each of the groups." Castro v.

Beecher, 386 F.Supp. 1281, 1285 (D. Mass. 1975) (emphasis added).

On July 7, 1975, the district court approved and entered another implementing consent decree "in accordance with" this January 7, 1975, opinion and order. The consent decree (J.A. 52a-63a) provided for "the establishment of priority certification groups for police applicants, for an affirmative recruitment program for black and Hispanic applicants and for procedures for administration and reporting with respect to police entrance examinations." 522 F. Supp. at 875. (P.A. 78) The decree also provided that "[a]s a city or town achieves a complement of minorities commensurate with the percentage of minorities within the com-

munity, certification shall be made according to existing Massachusetts law." 522 F. Supp. 875. (P.A. 79)

On July 13, 1976, the district court approved and entered a "Supplemental Consent Decree." (J.A. 64a) The preface to this decree read:

> This Court, having approved and entered a Consent Decree in this action on July 7, 1975, to allow a new police officer entrance examination to be given, and said examination having been given in October, 1975, the parties agree to this Supplemental Consent Decree to permit the marking of said examination and the establishment of an eligibility list for the position of police officer in the Commonwealth.

On July 1, 1979, the district court approved and entered an "Agreement As To May, 1978 Examination" signed by all parties to the action. (J.A. 70a) The agreement provided for various administrative and procedural tasks necessary to fulfill the remedial obligations

regarding examination, priority certification, and recruitment established by the prior decrees.

At no time during this lengthy process did the plaintiffs ever mount a challenge to the seniority provisions which underlie the current dispute. Only with their filing of a "motion to modify prior remedial orders" (J.A. 78a) on April 6, 1981, some eleven years after the original complaint was filed and two years after the parties' last agreement concerning the hiring process, did the plaintiffs ask the district court to override the provisions of Mass. Gen. Laws ch. 31, §39.

The Fire Case

Unsuccessful black and Hispanic applicants for appointment as City of Boston fire fighters and the Boston

Chapter of the NAACP commenced the fire case in 1972. As in the police case, the plaintiffs claimed racial discrimination; this time, however, in violation of 42 U.S.C. §§1981 and 1983 in connection with recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented through appointing procedures.

In 1973 the Attorney General of the United States brought an action raising similar claims, together with Title VII claims, 42 U.S.C. §2000e et seq. The two actions were consolidated.

Following hearings, the district court found that blacks represented approximately 16 percent of Boston's population, that the combined minority population was 23 percent of the total, and

that blacks and Hispanics represented only 0.9 percent of the fire department's sworn personnel. Boston Chapter, NAACP, Inc. v. Beecher et al., 371 F.Supp. at 514 (Freedman J.). The court found that plaintiffs had established an unrebutted case of racial discrimination. The court found, as evidenced by the "insignificant" number of blacks and hispanics certified, that the examinations administered from 196[illegible] through August 1971 were discriminatory. It also found that the word-of-mouth recruitment policy resulted in unintentional racial discrimination. Id. at 510, 515, 519-20.

The district court ordered a program of active recruitment of minority fire fighters, enjoined further certification based upon the results of the discrimina-

tory examinations, ordered development of a job-related examination, and required establishment of priority certification groups for black and Hispanic applicants. Id. at 520-23. It also ordered that the remedial measures in its decree remain in force for any city or town with a minority population greater than one per cent until the fire department of the municipality "achieves a complement of minorities commensurate with the percentage of minorities within the community" at which time "certifications will be made according to existing Massachusetts law." Id. at 523.

The First Circuit affirmed, holding that plaintiffs had demonstrated that the Massachusetts civil service test had a disproportionate impact on minority

hiring and that defendants had not demonstrated job-relatedness. Boston Chapter, NAACP, Inc. v. Beecher et al., 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975).

Since the 1974 decree, the district court entered several interim consent decrees and stipulations. (J.A. 9a; 19a; 32a; 35a; 36a) These subsequent orders set procedures for administration of new examinations, establishment of eligibility lists, affirmative recruitment, and notice and reporting. As in the police case, however, plaintiffs never mounted a challenge to the statutory seniority provisions which underlie the current dispute until their "motion to modify prior remedial orders" of April 6, 1981. (J.A. 42a)

Statement of Facts

The relevant facts in this most recent chapter in the police and fire cases draw their full flavor and color from the financial events occurring in the City of Boston in the spring and summer of 1981. Reference to employment patterns in the Boston Police and Fire Departments from 1970 to the present, however, is required to fully outline the factual basis for modification submitted by the plaintiffs and accepted by the district court.

Stipulations signed by the plaintiffs and the city defendants and submitted on July 30, 1981, and August 3, 1981, and the previous findings of the district court, set forth these employment patterns and formed the factual basis of this case. (J.A. 43a; 79a) In 1970, 3.6

percent of the 2804 sworn officers employed by the Boston Police Department were black or Hispanic. Castro v. Beecher, 334 F.Supp. at 943. At the same time, the black and Hispanic population of the city was 16.3 percent. Id. In 1974, prior to entry of the decree in the fire case, 0.9 percent of Boston's firefighters were black or Hispanic. Boston Chapter, NAACP v. Beecher, 371 F.Supp. at 514. At that time, those minorities comprised approximately 23 percent of Boston's population. Id.

Between 1974 and 1980 the percentage of minority police officers and firefighters on the Boston forces increased dramatically. During this period, the Boston Police Department hired 492 officers, of whom 213 (43 percent) were

black or Hispanic. (J.A. 79a) As of July 6, 1981, 224 of 1,912 police officers were black or Hispanic; minority representation had risen to 11.7 percent. (J.A. 79a) During the same period, 45 percent of the firefighters hired were black or Hispanic. (J.A. 43a) By July 6, 1981, minority representation had increased to 14.7 percent in the fire department. (J.A. 43a)

On July 7 and 8, 1981, Boston's police and fire departments commenced programs of reductions in force of police officers and firefighters. (J.A. 43a;80a) The departments "separated" officers from service because of a "fiscal crisis." (J.A. 44a) The layoffs were to be accomplished in compliance with the seniority

provisions of Mass. Gen. Laws Ann. ch. 31, §39 (J.A. 45a; 81a).

The stipulation of facts projected, and the district court found, that the July and August reductions in force contemplated by the City, if carried out according to Mass. Gen Laws c. 31, §39, would temporarily reduce the percentage of black and Hispanic sworn personnel in the Police Department to 6.2 percent. (J.A. 81a) The reductions proposed by the Fire Department would have temporarily dropped minority representation from 14.7 to 9.1 percent. (J.A. 45a) The district court also found that the "minority population of Boston has increased during the intervening decade to 30 percent." 522 F.Supp. at 876. (J.A. 43a; 79a-80a)

Against this backdrop of officer layoffs and concomitant reductions in black and Hispanic representation, the "modification" at issue was ordered.

SUMMARY OF ARGUMENT

I. The district court erred by suspending operation of a valid Massachusetts statute, Mass. Gen. Laws. Ann. ch. 31, §39 (West), never challenged in these cases. Despite the fact that the cases exclusively concerned hiring practices, the court entered remedial orders superseding §39 and requiring that percentages of minority members of municipal police and fire departments be maintained despite significant layoffs in those departments.

Contrary to previous opinions of this Court, the remedy imposed by the district court bore no relation to the scope of

any constitutional violation found in the prior proceedings in these cases. The implementation of remedial devices establishing new examination procedures and priority pooling of minority applicants corresponded to the nature of the original violations. The district court's August 7, 1981, order did not. The district court's order also exceeded the scope of any constitutional violations because it conferred benefits on recently hired minority officers who could not have been the victims of the prior discriminatory practices.

Finally, the district court abused its discretion by suspending operation of a valid state statute because the constitutional basis for its original findings of unintentional discrimination

was subsequently discredited by this Court. Since remedy must correspond to constitutional violation, findings of unintentional violations in a hiring process which rest on discredited legal principles form an insufficient constitutional predicate for suspension of a valid statutory layoff system.

II. Recent decisions of this Court upholding bona fide seniority systems establish that independent, discriminatory employment practices perpetuated by application of a bona fide seniority system form an insufficient basis for invalidation of those systems. Application of §39 to the layoffs at issue should be evaluated in accordance with this precept. Although plaintiffs-respondents did not seek to invalidate

the bona fide seniority system embodied in §39, the district court could not by "suspension" of state law or "modification of prior orders" circumvent the protection afforded such systems because that protection extends not only to entire systems but to particular applications of seniority provisions to events such as reductions in force expressly covered by those systems and vital to their operation.

III. The district court's orders contradict principles of federalism embodied in the Tenth Amendment. The Constitution's explicit grants of federal authority are subject to the Tenth Amendment's affirmative limitation protecting the States qua States. The Court gave new voice to this proposition in National League of Cities v. Usery, 426 U.S. 833

(1976). The principles announced in that decision apply with equal force to orders of a federal court which displace or impede integral governmental functions and thus usurp powers reserved to the States by the Tenth Amendment.

The district court orders violate the Tenth Amendment because they regulate the State as a State, address matters that are indisputable attributes of state sovereignty, and directly impair the State's ability to structure integral operations in areas of traditional governmental functions.

ARGUMENT

I. THE LOWER COURTS ERRED BY SUPERSEDING A VALID MASSACHUSETTS STATUTE NEVER CHALLENGED IN THIS CASE.

Plaintiffs' request to modify the district court's prior remedial orders (J.A. 42a; 78a) grew out of their dissatisfaction with application of Mass. Gen. Laws Ann. ch. 31, §39, to the layoff of police and firemen undertaken by the City of Boston in July of 1981. Pursuant to §39, permanent employees are "separated" from their positions according to seniority. Thus the least senior employees are separated first.[9/]

9/ Section 39 is reproduced supra at 5-6. Its provisions parallel the provisions of other states' statutes applicable to public service layoffs. An exhaustive list of similar statutes appears at A. 47-48 of the Boston Firefighters Union, Local 718's Petition for a Writ of Certiorari.

Section 39 has never been challenged in the long histories of the police and fire cases. Nor was it challenged in plaintiffs' "motion to modify prior remedial orders." Despite its continuing validity, however, both the district court and the court of appeals suspended its operation and ordered that percentages of minority officers be maintained despite layoffs in the respective departments.

Suspension of Mass. Gen. Laws Ann. ch. 31, §39 in this case represented an abuse of the district court's equitable power and an intrusion into the prerogatives of the Massachusetts Legislature. Contrary to previous opinions of this Court, the remedy imposed by the district court bore no relation to the scope of

any constitutional violation found in the prior proceedings in these cases. Furthermore, the legal basis for the original violations, i.e., unintentional discrimination, was discredited by the Court in Washington v. Davis, 426 U.S. 229 (1976) and therefore formed an insufficient predicate for the August 7, 1981, orders. The state petitioners analyze each of these considerations in turn.

A. The Remedy Imposed By The District Court Bore No Relation To The Scope of Any Constitutional Violation.

While the reach of federal equitable power is broad, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971), it "is not plenary." Hills v. Gautreaux, 425 U.S. 284, 293 (1976). There are "fundamental limitations" on

"the remedial powers of the federal courts to restructure the operation of state and local governmental entities." Id. A federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." Id. at 293-294, quoting Milliken v. Bradley, 418 U.S. 717, 744 (1974) and Swann, 402 U.S. at 16.[10/]

In this case the district court found constitutional violations in certain police and fire entrance examinations administered by state officials between

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10/ Although Milliken addressed questions of impermissible remedies for school desegregation, its holding "was premised on a controlling principle not limited to a school desegregation context." Hills v. Gautreaux, 425 U.S. at 294 n.11.

the years 1968 and 1971.[11] Remedial orders requiring new examination and certification procedures and priority pooling[12] therefore corresponded to the nature of the original violations found. The remedial orders were designed first to establish a racially neutral statewide system of examination and certification for public safety positions, and then to create a mechanism for increasing minority representation in the respective forces. Having previously established those systems, however, the district court's recent order requiring that a certain percentage of minority

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11/ Castro v. Beecher, 334 F. Supp. at 941; Boston Chapter, NAACP v. Beecher, 371 F. Supp. at 510-512.

12/ See pp. 9-21, supra.

officers be maintained, despite layoffs and despite a valid state seniority statute, exceeded the court's authority. Cf. Pasadena City Bd. of Education v. Spangler, 427 U.S. 424, 433-435 (1976) (district court exceeded its authority by enforcing desegregation orders so as to require annual readjustment of attendance zones to insure racial balance).

The task of a court of equity confronted with constitutional violations "is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." Milliken v. Bradley, 418 U.S. at 738. Not all social conditions, however, pose questions of constitutional dimension. This Court has counseled against "equa-

ting racial imbalance with a constitutional violation calling for a remedy." Id. at 741 n.19. There exists no "substantive constitutional right to a particular degree of racial mixing or balancing." Pasadena, 427 U.S. at 433-434; Swann, 402 U.S. at 24.

Notwithstanding these precepts, the district court expressly characterized this case at oral argument as "a percentage matter." (1st Cir. P.A. 75, 84, 85-86) The district court's demographic concern that the percentages of minority officers on the police and fire forces remained less than the percentage of minorities in the City of Boston at the time of the August 7, 1981, orders, however, did not constitutionally justify its action. Indeed, Pasadena v. Spangler expressly dismissed this reasoning:

> It may well be that petitioners have not yet totally achieved [a] unitary system. . . . But that does not undercut the force of the principle underlying the quoted language from Swann. In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished that objective. That being the case, the District Court was not entitled to require the PUSD to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

Id. at 436-437 (emphasis original). Thus the Court defined the limit of federal equitable power by reference to the implementation of remedial devices, not by measuring progress in light of demo-

graphic patterns subject to forces unrelated to the source of the original constitutional violations.

Where, as here, previous court orders eliminated racially discriminatory practices in the examination and certification of applicants for public safety positions, and court-ordered priority pooling created preferences for minorities in the hiring process, the fact that minority representation in the forces remained less than minority representation in the population of the City of Boston did not provide the district court with the authority to suspend a valid state statute to preserve minority percentages in the face of layoffs.

The district court orders also exceeded the scope of any constitutional violation because they suspended operation of a statutory seniority system never implicated in the prior judicial findings of impermissible conduct. This Court struck down a similarly intrusive federal judicial remedy in Milliken v. Bradley. There, a lower court's "metropolitan" desegregation remedy was held to be "impermissible" because "it restructured operation of local governmental entities not implicated in any constitutional violation." Hills v. Gautreaux, 425 U.S. at 296. Absent proof of an "interdistrict violation," Milliken held, there existed no "constitutional wrong" calling for an "interdistrict remedy." Id. at 744-745.

Similarly, in the absence of proof of unconstitutional operation of the Massachusetts statutory seniority system, the district court lacked power to suspend the valid state law which established it. Cf. Chance v. Bd. of Ed., 534 F.2d 993, 997 (2d Cir. 1976), cert. denied, 431 U.S. 965 (1977).13/

The fact that previous judicial findings of unintentional discrimination in examination procedures had been made against state administrators did not

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13/ Contrast Morgan v. O'Bryant, 671 F.2d 23, 26-27, 27 n.5 (1st Cir. 1982), cert. denied, 103 S.Ct. 62 (1982)(absent "proceedings and proof showing that Boston's dual school system had been abolished," and that "desegregation remedial goals" have been "fully achieved," district court retained power to make orders premised on original constitutional violations). In the instant case, however, constitutional violations were limited to the examination procedure. There existed, therefore, no remaining "constitutional wrong" calling for a remedy, as in the Boston school case.

justify extension of judicial remedies to the statutory layoff system.[14/] Although Massachusetts officials supervise both the examination and termination procedures, the unintentionally unconstitutional administration of a discriminatory testing device by state officials did not abrogate the inextinguishable, independent right and power of the Massachusetts Legislature to determine the appropriate termination procedures for public safety officers.[15/] "The

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14/ Cf. Milliken v. Bradley, 418 U.S. at 734-735, n.16; 742-746 (despite constitutional violations by Michigan state officials, interdistrict desegregation order impermissible because it would abrograte rights and powers of suburban school districts under Michigan law).

15/ Cf. Massachusetts Retirement Board v. Murgia, 427 U.S. 307, 314-317 (1976) (regulation of physical condition of public safety officers represents a legitimate purpose of state legislation).

federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." Milliken v. Bradley, 433 U.S. 267, 280-81 (1977)(Milliken II).

Previous school desegregation and employment discrimination cases decided by this Court have required the States "to redress the wrongs worked by specific instances of racial discrimination." University of California Regents v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). Implementation of neutral testing procedures and preferential priority pooling in these cases accordingly redressed specific "wrongs" and vindicated a constitutional entitlement. That entitlement did not, however,

constitute a predicate for the recent remedy ordered by the district court. The district court ignored fundamental, affirmative limitations on the judicial power. The district court ordered, and the court of appeals approved, a remedial decree which transcended all previous judicial determinations in these cases and superseded a valid state seniority statute administered in complete accord with the Constitution. This grant of relief was patently incommensurate with the constitutional violations to be repaired.

The district court's order contradicts the Milliken v. Bradley formula for another, related reason. Since the scope of a federal court's remedial

orders must conform to the scope of the constitutional violation, it follows that a court may only impose burdens designed to remedy the actual effects of a prior legal violation in order to make the identified victims whole. Milliken II, 433 U.S. at 280-281. See Fullilove v. Klutznick, 448 U.S. 448, 525 n.4 (1980) (Stewart, J., dissenting). The "victims" of discrimination may include those personally denied employment or other opportunity, as well as those who, e.g., were deterred from application yet could have been hired but for the discriminatory practices. The district court's recent order, however, afforded relief to all minority officers, whether or not they had been wrongfully denied certification or deterred from application by

use of the discriminatory testing device. The district court conducted no hearings to identify those scheduled for layoff who had been victimized by the past discriminatory examination and certification practices. Indeed, the district court failed to identify even those who, because of their age,[16/] could not have been "victims" of the discrimination which occurred ten to fourteen years ago. The court of appeals acknowledged that "[t]he orders require that there be a certain percentage of minorities . . . without regard to whether the individuals

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16/ Age limitations on applicants for public safety positions, see Mass. Gen. Laws Ann. ch. 31 §58, rendered the possibility highly unlikely that those who benefited from the district court's orders could have been the victims of the earlier discriminatory practices.

comprising the minority percentage were the actual victims of past discrimination." Boston Chapter, NAACP v. Beecher, 679 F.2d at 975. (P.A. 49) In fact, the orders benefited primarily those not harmed by past acts of discrimination, because the relief protected relatively young minority officers most recently hired. Thus, while the opinions of the district court and the court of appeals characterize the order as a remedial measure, "it plainly operates as a quota." Fullilove v. Klutznick, 448 U.S. 448, 541 n.13 (Stevens, J., dissenting). The order was not narrowly tailored to make identified victims whole. Id. at 525 n.4 (Stewart, J., dissenting). Rather, it swept broadly, conferring benefits indiscriminately on victims and non-victims alike.

The court of appeals placed great emphasis on the fact that "underrepresentation" of minorities still existed in the forces, and that layoffs made according to seniority would "eviscerate" relief already ordered. 679 F.2d at 974-975. (P.A. 45) But if these considerations alone can justify the random award of constructive seniority embodied in the district court's order, and the suspension of a valid state statute, it will serve not merely as a basis for this remedial order, but rather as a permanent source of justification for an entitlement to a certain percentage of minority officers on the city's police and fire forces. See Pasadena v. Spangler, 427 U.S. at 433-434; Fullilove v. Klutznick,

448 U.S. 448, 539 (1980)(Stevens, J., dissenting).[17]

B. The Legal Basis for the Original Findings of Constitutional Violations Was Discredited By This Court And Therefore Formed An Insufficient Predicate For The District Court's Orders.

The district court also abused its discretion by suspending operation of a valid state statute because the legal basis for the original findings of unconstitutional discrimination in the police case was explicitly discredited

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17/ Ironically, the right to such an entitlement was expressly rejected by the police case trial judge in his opinion following remand, Castro v. Beecher, 365 F. Supp. 655, 659 (D. Mass. 1973):

> [The desirability of a police force drawn from all groups] does not imply that any group is entitled to a qucta, nor to a fraction roughly corresponding to the fraction of the total population which belong to that group.

by this Court in Washington v. Davis, 426 U.S. 229 (1976). Without exception, every decision rendered in both cases has found that, to the extent discrimination occurred, that discrimination was unintentional. See, e.g., Castro v. Beecher, 334 F. Supp. 930, 934, 944, 948 (D. Mass. 1971); Castro v. Beecher, 459 F.2d 725, 727 (1st Cir. 1972); Boston Chapter, NAACP v. Beecher, 371 F. Supp. at 519-520.

In Washington v. Davis, however, the Court noted that various courts of appeal had erroneously held proof of a disproportionate impact sufficient, in the context of public employment, to prove racial discrimination in violation of the Equal Protection Clause. The Court cited Castro v. Beecher as a case wrongly decided. Washington v. Davis, 426 U.S. at 244 n.12. Despite this express disap-

proval, the court of appeals justified the scope of the district court's order by reference to the violations found in the original suits. Boston Chapter, NAACP v. Beecher, 679 F.2d at 974. (P.A. 45) The court stated that the "independent violations" found in the original suits distinguished the cases from related Title VII decisional law[18/] and characterized the "basic issue at stake" in the cases as "the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs." Id. (emphasis added).

While the state petitioners do not contest the fact that discrimination claims were once litigated, and that

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18/ See Section II, infra.

findings were entered against them, they do contest present reliance on those discredited constitutional conclusions to justify the "modification" of the court's prior orders to encompass relief never at issue in the "litigated" cases. The district court's power was circumscribed by the disfavored legal underpinnings of its original decisions. Reliance on the original erroneous conclusions to supersede a valid Massachusetts law only compounded the lower courts' original mistakes.19/

Respondents attempt to palliate Washington v. Davis by dismissing the State's argument as a "collateral attack

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19/ Alternatively, reliance by the lower courts on "findings" based on the United States' Title VII claim in the fire case would squarely conflict with Title VII's express protection of bona fide seniority systems and decisions of this Court upholding that protection. See Section II, infra.

upon earlier judgments and a challenge to all ongoing relief."[20/] The State mounts no such assault. The State's opposition to the "modification" of prior orders implies no challenge to the orderly processes of examination and certification established by judicial decree and ratified by subsequent agreements of the parties. The district court's "modification," however, invoked equitable powers. The exercise of those powers required a constitutional predicate. The court of appeals identified that predicate as the "independent violations" found in the original suits. Since remedy must correspond to violation, Milliken v. Bradley, 418 U.S. at 744, unintentional violations resting on

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20/ Brief of Respondents in Opposition to Petitions for a Writ of Certiorari at 20.

discredited legal principles necessarily form weaker legal predicates than intentional violations based on undisturbed law. Furthermore, the strength of original findings offered as legal predicate for the extension of equitable power must be assessed not by reference to the prevailing law at the entry of those findings but to the law at the entry of further equitable relief, because it is only then that the true scope of the violation can be accurately determined. See Milliken v. Bradley, 418 U.S. at 744.

Massachusetts does not contend that Washington v. Davis destroyed the constitutional predicate for the relief originally granted by the district court. The extension of that relief, however, to matters wholly outside the scope of the original constitutional violations

and prior court decrees requires examination of all aspects of the proffered predicate. In this case, measurement of the legal underpinnings of the district court's August 7, 1981, orders reveals fatal structural flaws.

II. THE LOWER COURT DECISIONS CONTRADICT RECENT DECISIONS OF THIS COURT UPHOLDING BONA FIDE SENIORITY SYSTEMS.

Title VII of the Civil Rights Act establishes that:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate[.]

42 U.S.C. §2000e-2(h).

The Court examined this language in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

There the Court held that a neutral and bona fide seniority system does not violate Title VII even if it perpetuates prior discrimination. Id. at 352-355. In Teamsters, the Court addressed job assignments and promotions made in compliance with seniority strictures. Id. at 349-350. The Court held that a disproportionate impact on last-hired minorities does not, standing alone, invalidate a facially-neutral seniority system. Id. at 352.

Two recent Supreme Court decisions have reaffirmed these precepts. American Tobacco Co. v. Patterson, ___ U.S. ___, 102 S. Ct. 1534 (1982) (American Tobacco) and Pullman-Standard v. Swint, ___ U.S. ___, 102 S. Ct. 1781 (1982) (Pullman-Standard). Both cases addressed issues regarding the construction and application of 42 U.S.C. §2000e-2(h). More

importantly, both cases underscored the protection afforded bona fide seniority systems by the statute. American Tobacco stated that the statute "exempts from Title VII the disparate impact of a bona fide seniority system even if the differential treatment is the result of pre-Act racially discriminatory employment practices." Id. at 1541. The fact that independent, discriminatory employment practices are "perpetuated" by application of a bona fide seniority system does not form a sufficient basis for invalidation of the system. American Tobacco, 102 S. Ct. at 1541. Absent a discriminatory purpose in application or operation of the system, the system itself is not an unlawful employment practice even if the system has some discriminatory consequences. Pullman-

Standard, 102 S.Ct. at 1784, citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 82 (1977). This result accords with the congressional judgment that:

> [T]itle VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

Teamsters, 431 at 352-353.

Application of Mass. Gen. Laws Ann. ch. 31, §39, should be evaluated in accordance with these tenets, as well as reference to the principles of equity jurisprudence and federalism enunciated in Sections I and III of this brief. Since §39 sets forth precisely the type of seniority-based layoff system envisioned by 42 U.S.C. §2000e-2(h) and up-

held by the Supreme Court,[21] it should control the layoffs in this case.

The fact that the district court "suspended," rather than invalidated, the bona fide seniority system embodied in Mass. Gen. Laws Ann. ch. 31, §39, renders its orders no less offensive to these precepts. The district court could not by "suspension" of state law or "modification" of prior orders circumvent the protection afforded bona fide seniority systems by this Court. That protection extends not only to preservation of the system, but to protection of

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21/ The Court has defined a "seniority system" as "a scheme that . . . allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." California Brewers Association v. Bryant, 444 U.S. 598, 606 (1980).

particular applications of seniority provisions to events such as reductions in force expressly covered by the system and vital to its operation. To ignore the system under such circumstances actually invalidates its operation: the practical effect of the "suspension" of §39 on those ostensibly protected by seniority is indistinguishable from the effect of an order declaring application of §39 violative of Title VII or the Constitution.

Here, however, the lower courts found sufficient justification to override bona fide seniority rights. The court of appeals stated:

> We find nothing in [Teamsters, Franks and American Tobacco] that precludes a court from ordering relief to remedy discrimination that exists apart from the adoption or application of a bona fide seniority system. . . . None of the Supreme Court cases apply

> to the basic issue at stake here; the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs. To hold a seniority system inviolate in such circumstances would make a mockery of the equitable relief already granted.

Boston Chapter, NAACP v. Beecher, 679 F.2d at 974. (P.A. 45)[22/] The court of appeals thus distinguished the cases before it from the Title VII precedents on the basis of: (1) the "independent," litigated findings of discrimination; and (2) the Court's power to preserve relief achieved pursuant to previous orders.

These considerations did not justify the relief ordered. It may well be that

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22/ Compare Stotts v. Memphis Fire Department, 679 F.2d 541 (6th Cir. 1982) petition for cert. filed August 5, 1982, 51 U.S.L.W. 3120 (advancing several theories to permit consent decree to alter collective bargaining agreement seniority provisions).

independent, litigated findings of discrimination in employment practices may entitle persons affected by those practices to full relief, including their rightful place in the seniority system, see Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); that such relief may insulate those persons from the effects of a "last-hired, first-fired" layoff system; and that a court may act to insure that result. Only those victimized by the discriminatory practices, however, may invoke such protection. For example, individuals who fail to timely challenge discrimination cannot later complain of a "continuing violation" embodied in the seniority system.[23/]

23/ Croker v. Boeing Co. (Vertol Div.), 437 F. Supp. 1138, 1187 (E.D. Pa. 1977), aff'd in part, vacated on other grounds, Croker v. Boeing Co., 662 F.2d 975 (3rd Cir. 1981) (en banc).

Similarly, those persons not victimized by past acts of discrimination should not be afforded relief that suspends valid statutory seniority provisions, because no factual predicate exists for such relief.

Notwithstanding these limitations on plenary relief, the district court's orders benefited primarily persons who could not have been harmed by past acts of discrimination. See Boston Chapter, NAACP v. Beecher, 679 F.2d at 976 and 976 n.14. (P.A. 54-56)[24/] The district court conducted no hearings to identify which of the police and firemen scheduled for layoff could not have been victimized by the past discriminatory examination and certification practices. Indeed the

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24/ See pp. 44-47. supra.

fact that the relief protected individuals most recently hired ensured that few, if any, members of the original class would benefit from the most recent orders. See id.

Thus, the distinction drawn by the court of appeals between this case and the Title VII decisional law upholding seniority rights -- "the litigated findings of discrimination" -- does not support the district court orders because those findings do not justify the extension of relief to individuals who could not have been victimized by past discrimination. Furthermore, any constitutional "findings of discrimination" on which the court of appeals could have relied were explicitly discredited by

this Court in Washington v. Davis.[25/] Under the circumstances, the district court lacked the authority to insulate persons not victimized by discrimination from application of the bona fide seniority system embodied in §39. The court's power to "preserve relief" extended at most to insuring that the victims of discrimination retained their rightful place in the seniority system, protected from discharge under the "last-hired, first-fired" layoff system. See Franks v. Bowman, 424 U.S. 747, 762-770 (1976). The court's foray beyond that well-defined limit warrants reversal.

25/ See Section I.B., supra.

III. THE LOWER COURT DECISIONS CONTRADICT PRINCIPLES OF FEDERALISM EMBODIED IN THE TENTH AMENDMENT AND APPLIED BY THIS COURT IN NATIONAL LEAGUE OF CITIES V. USERY.

A. The Tenth Amendment Proscribes Federal Interference With State Sovereignty.

The Tenth Amendment to the United States Constitution states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution, Amendment X. Thus, powers not delegated to the federal government either expressly or as incidental or implied powers are reserved to the States. Conversely, when the federal government acts in pursuit of certain constitutionally enumerated objectives, it displaces state authority

in its path.[26/] However, the Tenth Amendment guarantees that "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Fry v. United States, 421 U.S. 542, 547 n.7 (1975). The Tenth Amendment thus embodies the constitutional policy that the Constitution's explicit grants of federal authority are subject to an affirmative limitation protecting the sovereignty of the States qua States.

Six years ago the Court gave new voice to this proposition. In National League of Cities v. Usery, 426 U.S. 833

26/ See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241, 262 (1964)(when Congress regulates private economic activity it may preempt state law); see also Jones v. Rath Packing Co., 430 U.S. 519, 525-526 (1977) and United States v. Darby, 312 U.S. 100, 113, 115 (1941).

(1976), the Court applied the Tenth Amendment as an "affirmative limitation" upon congressional authority to enact legislation pursuant to its Commerce Clause power which directly impairs state autonomy in areas of government traditionally reserved to the States. National League of Cities declared that by imposing wage and hour regulations upon states as employers through three 1974 amendments to the Fair Labor Standards Act (FLSA),[27/] Congress had interfered with the ability of the States to make decisions affecting "integral" state functions. Id. at 851-52. The Court stated that authority "to structure employer - employee relationships in such areas as fire prevention [and]

27/ See 29 U.S.C. §§203(d), 203(s)(5), 203(x).

police protection . . . " was essential to the "independent existence" of states and thus was an integral element of state sovereignty. Id.

National League of Cities conceded that Congress' 1974 amendments to the FLSA were "undoubtedly within the scope of the Commerce Clause." Id. 841. The Court questioned, however, whether the Act "encounter[ed] a . . . constitutional barrier because [it] applied directly to the States and subdivisions of States as employers." Id. Citing Heart of Atlanta Motel v. United States, 379 U.S. 241, 262 (1964), the Court reaffirmed its prior holdings that found no Tenth Amendment barrier to Congressional regulation of private economic activity. Id. at 840. The Court noted, though, a profound distinction between the private nature of

the previous objects of federal commercial regulation and the public, sovereign nature of the objects of the FLSA amendments:

> [T]he States as States stand on quite different footing from an individual or corporation when challenging the exercise of Congress' power to regulate commerce.

Id. at 854. The Court explained that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." Id. at 845. The Court held that the power to set the wages and work hours of state employees was "an undoubted attribute of state

sovereignty." Id. Since the challenged regulations would "displace the States' freedom to structure integral operations in areas of traditional governmental functions," id. at 852, the Court concluded that Congress could not, consistently with the Tenth Amendment, "abrogate the States' otherwise plenary authority to make [these decisions]." Id. at 846.

The Court restated the three inquires that formed the core of the National League of Cities analysis in Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 287-288 (1981). The Court summarized that a congressional enactment violates the Tenth Amendment if it regulates the States as States, addresses matters that are indisputably attributes of state

sovereignty, and directly impairs the States' ability to structure integral operations in areas of traditional governmental functions. Id. Accord, United Transportation Union v. Long Island Railroad, ___ U.S. ____, 102 S. Ct. 1349, 1353 (1982).28/

28/ In Hodel the Court measured portions of the Surface Mining Control and Reclamation Act of 1977 against these standards and reversed a lower court determination that certain of the Act's provisions violated the Tenth Amendment. The Court held that the provisions of the Act governed only the activities of private coal mine operators and therefore did not regulate the "States as States." Id. at 288, 293. In United Transportation the Court held that the Tenth Amendment did not bar application of the Railway Labor Act, 45 U.S.C. §§151 et seq., to a state owned railroad because operation of the railroad was not an "integral part of traditional state activities." Id. at 1354. For the reasons set forth in subsection III, B, infra at 77-91, these holdings support Massachusetts' argument in this case.

Lower federal courts have applied these principles and invalidated application of the FLSA amendments to a variety of "integral governmental functions."[29/] The courts have extended the reach of National League of Cities to other congressional enactments under the Commerce Clause as well. In EEOC v. Wyoming, 514 F.Supp. 595 (D. Wy. 1981), prob. juris. noted, 102 S.Ct. 996 (1982), argued October 5, 1982, 51 U.S.L.W. 3282, for example, the court applied the case's

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29/ See, e.g., Amersbach v. City of Cleveland, 598 F.2d 1033, 1037-38 (6th Cir. 1979)(operation of municipal airport); Enrique Molina-Estrada v. Puerto Rico Highway Authority, 680 F.2d 841, 843-846 (1st Cir. 1982)(operation of highway authority which builds and maintains roads); Alewine v. City Council of Augusta, 505 F.Supp. 880, 888-89 (S.D. Ga. 1981)(operation of municipal transit system); Dove v. Chattanooga Area Regional Transportation Authority, 539 F.Supp. 36, 39-42 (E.D. Tenn. 1981)(same).

holding to the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§621 et seq. (ADEA). The court held that application of the ADEA to a Wyoming statute which permitted mandatory retirement of a game warden at age fifty-five would adversely affect the state's management of its wildlife resources and therefore violate the Tenth Amendment.30/

It is of no constitutional significance that this case poses a conflict between integral state governmental functions on the one hand and the exercise of judicial, as opposed to legislative power on the other. The principles of

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30/ See also Taylor v. Department of Fish and Games, 523 F.Supp. 514 (D. Mont. 1981).

federalism embodied in the Constitution apply to the federal judiciary as well as to Congress. United States Constitution Amendment XI. See Hans v. Louisiana 134 U.S. 1, 10-11 (1890); Chisholm v. Georgia, 2 U.S. (Dallas) 419 (1792). The Tenth Amendment protects state governments from improper federal encroachment whatever its source. National League of Cities' principles thus apply with equal force to orders of a federal court which displace or impede integral governmental functions and usurp powers reserved to the States by the Tenth Amendment. Davids v. Akers, 549 F.2d 120, 127 (9th Cir. 1977). In Davids v. Akers the Ninth Circuit affirmed the dismissal of an action brought by members of the Arizona House of Representatives and Arizona voters against the Speaker of the House

which challenged committee appointment procedures utilized by that body. The court rejected plaintiffs' constitutional claims and added that the language of National League of Cities "strengthened" the court's conclusion. The court found the principles of National League of Cities fully applicable to federal court orders:

> It is true, of course that in Usery the Court dealt with the power of Congress, while here we deal with the power of the federal courts. But the principle is the same. Indeed, if what the Court says about a Congressional enactment, to which the Supremacy Clause expressly applies, is correct, it should apply to the power of the federal court.

549 F.2d at 127.[31/] This Court

31/ Accord, United States v. Best, 573 F.2d 1095, 1102-03 (9th Cir. 1978) (limitations on power of Congress recognized in National League of Cities apply equally to the power of the federal courts; federal magistrate's suspension of motorist's California driver's license interferes with "integral" state governmental function).

suggested similar application of Tenth Amendment principles in dicta in FERC v. Mississippi, __ U.S. ___, 102 S. Ct. 2126, 2142-2143 n.32 (Tenth Amendment permits "challenge to federal interference" with state sovereignty) (emphasis added). Accordingly, the August 7, 1981, order of the district court may be properly measured against the legal framework erected by National League of Cities.

B. The District Court Order Violated The Tenth Amendment.

The August 7, 1981, order of the district court in this case regulates the "States as States," addresses "matters that are indisputably attributes of state sovereignty," and "directly impairs the States' ability to structure integral operations in areas of traditional governmental functions." Hodel,

452 U.S. at 287-288; United Transportation Union, 102 S.Ct. at 1353.

The federal court order manifestly regulates the "States as States." The order suspends operation of a valid state law directly applicable to the police and fire layoffs and never challenged in these cases. Indeed, the First Circuit's opinion concedes that "the district court's order superseded the operation of the reverse seniority layoff provisions of the Massachusetts Civil Service statute, Mass. Gen. Laws Ann. ch. 31, §39." 679 F.2d 965, 973 (1st Cir. 1982) (P.A.38)[32/] The order directly imposes

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32/ The First Circuit later appears to qualify this statement by suggesting that "[t]he order was designed to operate within the framework of the statute, although modifying it to the extent necessary to preserve the integration already achieved." 679 F.2d at 975. (P.A. 48) In their Brief in Opposition to

(footnote continued)

specific duties on state and local officials.[33] The order imposes no duties whatsoever on private persons or organizations.[34] Nor is the "ultimate

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(footnote continued)

Petitions for Certiorari at 16 respondents propound the same myth, but the record permits only one characterization: that the district court order superseded a valid state law.

33/ See n.36, infra. The fact that the orders mandate local as well as state action does not diminish their intrusiveness under governing Tenth Amendment principles. See National League of Cities, 426 U.S. at 851 and 855-856 n.20. The sovereignty of States rests in large part on their authority to organize and supervise local governments. Id. See Massachusetts Constitution, Amendment Article II §§1-8. See also Frug, The City as Legal Concept, 93 Harv. L. Rev. 1059 (1980).

34/ Contrast Hodel, 452 U.S. at 288 ("Surface Mining Act govern[s] only the activities of coal mine operators who are private individuals and businesses") and FERC v. Mississippi, ___ U.S. ___, 102 S.Ct. 2126, 2141 (1982). Contrast also State of Minnesota v. Block, 660 F.2d

(footnote continued)

aim" of the orders the regulation of private activity.[35] The orders directly and exclusively regulate the activities of state and local government officials and thus regulate the "States as States."

The orders also address "attributes of state sovereignty." The orders of the federal district court directly impose duties on state and local officials that contradict their fundamental statutory duties to regulate public safety

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(footnote continued)

1240,1251-1253 (8th Cir. 1981)(provisions of Boundary Waters Canoe Area Wilderness Act of 1978 restricting use of motorboats and snowmobiles on land and waters under state jurisdiction regulate private individuals, not "States as States").

35/ See FERC v. Mississippi, 102 S. Ct. at 2147 (O'Connor, J., dissenting in part).

employment.[36] The district court provided no discretion to state and local officials to ignore or modify its judicial mandates.[37] Rather, the

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36/ The district court enjoined City of Boston officials from reducing by layoff the percentage of minority police and firefighters below August 7, 1981, levels; ordered those officials to "establish and maintain separate seniority lists" for minority and non-minority officers; ordered them to compute seniority within each list, and to terminate the least senior officers "from each of the two lists according to a mathematical ratio so that the percentage of minority [officers] at no time [would fall] below 14.7 percent"; enjoined Massachusetts Civil Service Commission officials from invalidating the terminations for failure to follow statutory seniority provisions; and ordered the Massachusetts Personnel Administrator to establish and maintain lists of terminated officers and to certify officers for reinstatement in reverse order of their layoff so as to preserve at all times the August 7, 1981, percentage of minority officers.

37/ Contrast Hodel, 452 U.S. at 288 (States "not compelled to enforce the [federal] standards or to expend state funds"; Surface Mining Act therefore

(footnote continued)

officials face the alternatives of compliance with orders contradicting their state law duties or contempt.

The power to determine the method of termination of public safety officers in the Commonwealth lies at the core of state sovereignty. "[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature." FERC v. Mississippi, 102 S. Ct. at 2138. Sovereignty thus rests primarily in the States' power to make choices and decisions fundamental to their role as providers of traditional public services such as police and fire protection. Surely if a "State's power

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(footnote continued)

does not "commandeer" the "legislative processes" of the States) and FERC v. Mississippi, 102 S. Ct. at 2140 (nothing in PURPA "directly compelling" the States to enact a legislative program).

to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, [the] hours those persons shall work, and [the] compensation [that] will be provided" for overtime work is "[o]ne undoubted attribute of state sovereignty," National League of Cities, 426 U.S. at 845, a State's power to determine the formula by which its public safety officers are separated from their employment is another. In fact, the legislature's determination of the appropriate method for terminating public safety personnel for fiscal reasons actually exceeds in importance the "determinations" of the conditions of public employment previously found by the Court to be "essential" to a State's "separate and independent existence," National

League of Cities, 426 U.S. at 845, because layoff decisions ordinarily pose greater threats to the efficient operation of public service agencies.[38] The recent orders of the district court displace this fundamental state decision. For this reason, the orders directly impinge upon the sovereignty of the Commonwealth of Massachusetts.

Finally, the order directly impairs the States' ability to "structure integral operations in areas of traditional governmental functions." National League of Cities, 426 U.S. at 852. Indeed, application of Mass. Gen. Laws Ann. ch. 31, §39, to the police and fire layoffs in this case represents one of the "govern-

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38/ The state petitioners discuss the importance of seniority to the operation of public safety agencies at pp. 87-89, infra.

mental functions" -- regulation of employment in police and fire departments -- enumerated by National League of Cities as "typical" of those "traditionally afforded" citizens by their state and local governments and therefore essential to a state's "independent existence." Id. at 850-851.

The nature of the function supports this conclusion. State and local governments have historically been the principal providers of police and fire services.[39/] The protection offered by local police and fire departments benefits the entire community, draws upon

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39/ National League of Cities, 426 U.S. at 851. See Massachusetts Retirement Board v. Murgia, 427 U.S. 307, 314-317 (1976)(regulation of physical condition of public safety officers represents a legitimate purpose of state legislation).

public funds, and is undertaken for the purpose of public service rather than pecuniary gain.

State and local governments are particularly well suited to the tasks of police and fire protection because of the state-wide need for those services. "Indeed, it is functions such as [fire prevention and police protection] which governments are created to provide, services such as these which the States have traditionally afforded their citizens." Id. at 851.40/

40/ One commentator suggests that the focus in National League of Cities on "traditional areas of state control" parallels the Framers' determination that by reserving to the States powers over "familiar concerns," The Federalist Papers, No. 16 at 116, (Mentor ed., 1961), such as "internal order," id. No. 45 at 292-93, the Constitution would protect the States' "capacity to elicit loyalty by providing for the needs of their residents." Nagel, Federalism As A Fundamental Value: National League of Cities in Perspective, The Supreme Court Review, 1981, (Kurland, et al. ed.

(footnote continued)

Furthermore, the order "directly impairs integral operations" in this area. Implementation of the order significantly alters the "employer-employee relationship" established by valid state law and supervised by state and local officials because it overrides a seniority provision that traditionally forms a cornerstone of that relationship. Seniority provisions have "become of overriding importance, and one of [their] major functions is to determine who gets or who keeps an available job." Humphrey v. Moore, 375 U.S. 335, 346-347 (1964); Franks v. Bowman Transportation, 424 U.S. at 747. They "are universally included"

(footnote continued)

University of Chicago Press)(1982) at 81, 101-109. Professor Nagel maintains that "[t]he longer an area has been subject to state control the more symbolic of state authority that area becomes." Id. at 102.

in collective bargaining contracts. American Tobacco Co. v. Patterson, ___ U.S. ____, 102 S.Ct. at 1541 (1982), quoting Trans World Airlines v. Hardison, 432 U.S. 63, 79 (1977). "[D]etioration in morale, labor unrest, and reduced productivity" often accompany disruption of an existing seniority system. See Ford Motor Co. v. E.E.O.C., ___ U.S. ___, 102 S. Ct. 3057, 3064 (1982).

Entitlements conferred by credits earned under the Massachusetts civil service seniority system likewise play a key role in the operation of local police and fire forces. Both public employers and employees rely on the seniority system to structure the allocation of benefits and privileges within local departments. Disruption of that system

in the public safety area not only produces the inefficiency cited in Ford Motor Co., supra, but endangers the public by fraying the formal and informal relationships between management, superior officers, and officers essential to effective police and fire protection. This disruption causes a "direct impairment of integral operations" which violates Tenth Amendment principles.

The orders entered by the District Court thus satisfy each element of the tripartite test established by National League of Cities and restated by Hodel.[41/] Under the circumstances of

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41/ In both Hodel and United Transportation Union the Court noted that under certain circumstances "the nature of the federal interest advanced may be such that it justifies state submission." Hodel, 452 U.S. at 288 n.29; United Transportation Union, 102 S. Ct. at 1353 n.9. The Court "has not yet explored the

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this case, the Tenth Amendment prohibits judicial interference, by "modification" of prior remedial orders or any other means, with an integral state function absent a finding that the applicable state law is unconstitutional. The lower court decisions in this case, superseding a valid state statute, contravene rights reserved to the Commonwealth of Massachusetts by the Tenth Amendment. Contrary to the principles of federalism

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circumstances that might justify such an exception." FERC v. Mississippi, 102 S. Ct. at 2147 n.4 (O'Connor, J., dissenting). Even if the Court's language may be interpreted to adopt an ad hoc balancing test which weighs the federal interest against the state activity sought to be displaced by federal mandate, the narrow scope of the original violations in these cases, the discredited constitutional underpinnings of the original decisions, and the protection uniformly afforded bona fide seniority systems by Congress and this Court require that the balance in this case be struck for the state.

embodied in that Amendment, the provisions of a presumptively valid state statute have been set aside notwithstanding the fact that no direct challenge to the statute was ever mounted and the underlying cases never implicated the layoff of public safety personnel. The justification for the action is the remedial authority of the district court, i.e., its ability to implement an eleven year old decision which this Court has already described as erroneous. Such action necessarily enervates the Tenth Amendment and its underlying doctrines.

CONCLUSION

For the reasons set forth above, the Court should reverse the judgment of the First Circuit.

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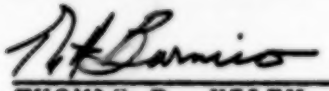

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CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Constitution of the United States

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code

42 U.S.C. §2000e-2(h)

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment

pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Massachusetts General Laws Ann. ch. 31, §6 (West)

Each appointment to a civil service position shall be made by an original appointment pursuant to the provisions of this section or by a promotional appointment pursuant to the provisions of section seven, except as otherwise provided by this chapter or other law.

Each such original appointment in the official service shall be made after certification from an eligible list established as the result of a competitive examination for which civil service employees and non-civil service employees were eligible to apply, except as otherwise provided by sections twenty-six, forty, forty-seven, fifty-six, and sixty.

An appointing authority desiring to make an original appointment in the official service shall, if a suitable eligible list exists, submit a requisition to the administrator. Upon receipt of such requisition, the administrator shall certify from such list the names of persons eligible for such original appointment. If no suitable list exists, or if the list contains the names of less than three persons who are eligible for and willing to accept employment, the appointing authority may request authorization to make a provisional appointment pursuant to sections twelve, thirteen and fourteen.

An appointing authority may requisition to fill any position by original appointment pursuant to this section, or, where a promotional appointment may be made under the civil service law and rules, it may requisition to fill a position by promotional appointment pursuant to section seven.

Any request by an appointing authority to the administrator to fill a vacancy, other than temporary vacancy,

in a permanent position shall include a statement that such position is permanent and that such vacancy is to be filled on a permanent basis.

Massachusetts General Laws Ann. ch. 31, §58 ¶2 (West)

A person shall be ineligible to become an applicant for an examination for original appointment to the position of fire fighter or the position of police officer in a city or town if he will not have reached his nineteenth birthday or will have reached his thirty-second birthday on or before the final date for the filing of applications for such examination, as stated in the examination notice.

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